Consumer Federation of America

August 2, 2017

The Division of Dockets Management
HFA-305
Food and Drug Administration
5630 Fishers Lane, Room 1061
Rockville, MD 2085

Re: Docket No. FDA–2011–F–0172
Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments; Extension of Compliance Date; Request for Comments

To Whom It May Concern:

The Consumer Federation of America (CFA) writes to urge the Food and Drug Administration to immediately implement the menu labeling rule,[1] and to oppose any further delay or weakening of the menu labeling regulations. For the reasons stated in our joint letter with other consumer and public health advocacy organizations, extending the deadline for compliance with the menu labeling rule until May 7, 2018 is contrary to the public interest. We write separately here to reiterate our view that consumers need and deserve access to calorie information on the full range of ready-to-eat foods and beverages covered under the rule, in a standard and easily comparable format, without further carve-outs and exemptions for industry holdouts. Additionally, we write to express our strong opposition to this interim final rule, which violates the law and defies any conceivable economic rationale.

This interim final rule was published on May 4, 2017, the day before the now delayed rule would have required covered food establishments to begin posting calorie counts on menus. In other words, this interim final rule granted an extension when the vast majority of covered retailers had already incurred the cost of complying with the rule. In addition, it signals that the agency may now change the requirements finalized in December of 2014, creating needless uncertainty and exhibiting a remarkable disregard for this rulemaking process and the many stakeholders who participated in it over the past seven years.

As with many other groups, CFA's engagement in this rulemaking process goes

[1] Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments; 79 Fed. Reg. 71,156, 71,161 (Dec. 1, 2014).

back to 2010, when we responded to FDA's request for comments, data, and information on implementing the calorie labeling requirements of the Patient Protection and Affordable Care Act. In our comments, we noted congressional findings that consumers have a right to information that enables them to protect their health and well-being. We noted the failure of over half of large chain restaurants to provide any nutrition information to consumers. We noted congressional findings that, when eating out, people eat more saturated fat and fewer nutrients, and that children eat almost twice as many calories as compared to when they eat at home. And we referenced the large body of research studies that show that providing nutrition information to restaurant patrons leads to healthier food choices.

In 2011, FDA issued its proposed rule and we submitted comments urging FDA not to exempt alcoholic beverages from menu labeling requirements. FDA had suggested in its proposed rule that it might include such an exemption. However, we pointed out that alcohol is a significant source of calories, and that the overall legal framework did not support excluding it from labeling requirements. As we explained, alcoholic beverages are frequently consumed in covered food establishments and excluding them from calorie labeling would frustrate many consumers' efforts to monitor their caloric intake and follow the Dietary Guidelines for Americans. FDA agreed with our position and decided not to exempt alcoholic beverages in the final rule that it issued in December of 2014. However, over two-and-a-half years later, food establishments are still not required to comply with calorie labeling requirements.

FDA had already extended the compliance deadline for menu labeling by a year when a congressional appropriations rider moved it back further still. At this point, retailers have had ample time to redesign their menus, train staff, and consult with FDA to resolve any lingering doubts about what they need to do to comply with the rule. The interim final rule's assertion that "critical implementation issues . . . may not have been fully understood" prior to this delay is unfounded.

Similarly untethered to reality is the interim final rule's assertion that this regulatory action will result in net economic benefits. As explained in detail in the comments and accompanying analysis submitted by CFA Senior Fellow Mark Cooper, FDA's own interpretation of the evidence demonstrates that delay is costly and unwarranted. This action has proceeded without any new additional analysis of the record. Under all of the various assumptions that FDA has considered, the cost of this delay exceeds any savings that may accrue to businesses by more than two-to-one. To arrive at a net positive benefit, the agency has had to resort to fantastic assumptions in the Regulatory Impact Analysis for the interim final rule. In particular, the agency's cost-benefit analysis asserts that *half* of covered establishments had not yet invested in fully complying with the rule just *one day* before it went into effect.[2]

[2] Interim Final Regulatory Impact Analysis, April 2017; https://www.fda.gov/downloads/AboutFDA/ReportsManualsForms/Reports/EconomicAnalyses/UCM557211.pdf ("We assume that 50 percent of covered establishments are already in compliance and therefore 50 percent of initial, upfront costs have already been incurred.").

In addition to being outlandish, these assumptions are arbitrary and capricious, and the interim final rule is clearly illegal under the Administrative Procedure Act, as made clear by a recent lawsuit filed by the Center for Science in the Public Interest and National Consumers League.[3] The agency should not wait for a federal court order to vacate this Interim Final Rule. Rather, FDA should act now to require compliance with the menu labeling rule, as it should have already under the law, and give consumers the information they need to make healthier choices.

Sincerely,

Thomas Gremillion
Director, Food Policy Institute
Consumer Federation of America

[3] CSPI and NCL's complaint is available here: http://earthjustice.org/sites/default/files/files/2017-06-07%20Complaint%20FINAL.pdf